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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 151.

HENRY BEHRENS, Petitioner,

v.

J. SCOTT SKELLY, CHARLES E. DEXTER, JR., MARC J. SANDLER, CLARENCE O. DEVORE, LIGGETT SPRING AND AXLE COMPANY and AXELTON WATER COMPANY, Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

In arguing in their brief (pp. 3-4) that commencement of a suit rather than rendition of a judgment is the time at which to determine privity, respondents set up a straw man. We did not advance this question in our principal brief but, on the contrary, we proceeded on the assumption that commencement of a suit is the proper time.

I.

There Is No Privity Under New York Law.

A. *Under The Doctrine Of Hailey v. Ano Neither Actual Notice Nor Constructive Notice Can Establish Privity In This Case.*

Respondents admit that *lis pendens* does not apply to this case and contend (brief, p. 3) "that the court by such reference was buttressing by analogy" its finding of privity. They now argue that regardless of *lis pendens,* the finding of privity by the lower court is supported by actual notice. (brief, p. 5.)

The language of the court below certainly indicates that it based its finding of privity on the doctrine of *lis pendens,* which, in our principal brief (pp. 12-13) we demonstrate to be inapplicable. However, anticipating that respondents would take recourse to the contention that privity might be predicated upon actual notice, we went further and quoted (brief, p. 13) the language of New York court in *Hailey v. Ano,* 1893, 136 N. Y. 569, 32 N. E. 1068, to the effect *that even actual knowledge of a suit for recovery of damages does not support a finding of privity.* Respondents' argument ignores the fact that "actual notice" is inapplicable for the same reason that *lis pendens* is inapplicable, as pointed out by the court in *Hailey v. Ano, supra.*

After thus ignoring New York law on privity, respondents blithely assert (brief, p. 5) that they would be bound had the award in question gone against Feuerring and Schwabacher. *Respondents conceded, in fact argued, precisely to the contrary before the District Court.* Nor

do we know of any case—and respondents cite none—in which a successful plaintiff in a suit for recovery of damages was permitted to fasten the judgment which he received on a third person, not a party to the first suit, merely because such third person was a transferee of personalty from the prior defendant subsequent to the institution of the first suit.

B. *Even Assuming the Applicability of Privity, The Succession In Interest Occurred Prior To The Commencement Of The Relevant Prior Litigation So That There Could Be No Privity.*

Respondents argue (brief, p. 6) that the Circuit Court considered *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, upon which we rely on the question of separability, and that the facts therein were not analagous to the facts in the instant case.

Reference to the Circuit Court's opinion (R. 141, 142) discloses that the citation of the *Commercial Casualty* case, in each instance, was one of a series cited only on the point that the date of the commencement of a suit and not the date of the rendition of judgment therein is the critical date in determining privity, a point not in issue here.

To clearly demonstrate that on the issue of separability the facts therein were analagous to the facts herein, and that the decision there should be controlling here, we take the liberty, at the risk of being redundant, of both requoting and paraphrasing the portion of the New York Court's opinion quoted in our principal brief (pp. 15-16):

FROM COMMERCIAL CASUALTY CASE	AS PARAPHRASED
"The proceeding in the Court of Claims was merely to determine whether or not the claim had merit. The court had no authority to determine the nature or extent of petitioner's interest in that claim nor did it attempt to do so. It merely found that McElligott had made an assignment to petitioner. The extent of petitioner's interest in that claim was not determined until the rendition of the judgment in its favor (in the action by the Casualty Co. against McElligott—the second proceeding). Long before that action was commenced the various other assignments of the same claim made by McElligott to the intervening defendants (subsequent assignees) had been executed and filed—" (Matter in parenthesis our own.)	The proceeding in the Supreme Court of New York was merely to determine whether or not the claim (that petitioner had a right to arbitration) had merit. The court had no authority to determine the nature or extent of petitioner's interest nor did it attempt to do so. It merely found that Feuerring and Schwabacher had made a valid agreement to arbitrate. The extent of petitioner's interest under the contract containing the arbitration clause was not determined until the rendition of the judgment against him. Long before that action (the arbitration itself) was commenced the transfer was made to the defendants in this suit.

To argue, as respondents do, (brief, pp. 6-7) that two separate actions were involved in the *Commercial Casualty* case and that only one action is involved here

is a striking example of litigants attempting to lift themselves by their own bootstraps. It indicates, also, that respondents fail to comprehend the issue involved, —whether notice, actual or constructive, of a pending proceeding which does not adjudicate any claim against a transferor binds a subsequent transferee.

Here the *only* issue adjudicated or involved in the proceeding to compel arbitration was whether or not the petitioner had a right, under the agreement of November 12, 1941, (R. 31a), to compel the respondents to arbitrate all "controversies, disputes and matters of difference which may have arisen among the parties" (R. 57a-60a). It was not an adjudication of any specific claim (R. 57a-60a). In the *Commercial Casualty* case, on the other hand, the proceeding before the Court of Claims adjudicated that the state was, without question, indebted to McElligott or the Insurance Company or both but left for the second proceeding the precise determination of the amounts owing to each. Nevertheless, on the ground that the first action did not adjudicate the extent of the petitioner's interest, the court held that the actions were separable. *A fortiori,* if the proceedings in the *Commercial Casualty* case were separable the proceedings here in question are likewise separable.

Respondents contend, on the strength of the opinion below (R. 143), that a proceeding to compel arbitration is analagous to the issuance and service of process in an ordinary law suit, and thus marks the commencement of an arbitration proceeding. This argument misapprehends the nature of an arbitration proceeding and overlooks the fact that a proceeding to compel arbitration is not a necessary or invariable element in the determina-

tion of a dispute by arbitration in New York. On the contrary, it is a special proceeding that is very seldom resorted to, and then only when it is necessary for a party aggrieved to force his adversary to proceed to arbitration, by a mandate of a court, the breach of which would be punishable as a contempt of court. When the order directing the parties to proceed to arbitration (or refusing to make such direction) is made, that special proceeding is terminated. *Marchant v. Mead-Morrison Manufacturing Co.*, 1929, 252 N. Y. 284, 169 N. E. 386.

II.

Respondents by Virtue of Being Accessories as Well as Principals to a Fraud Are Not Thereby Removed From the Application of the Joint Tort Feasor Rule.

Respondents argue (brief p. 7) that the allegation in the Complaint (R. 17a-18a) of a conspiracy between and among the New York respondents and the respondents here to defraud petitioner is immaterial. Their argument is bottomed upon the fact that the *res* here in question was *purportedly* (R. 17a) transferred to the instant respondents. The purported transfer was part and parcel of the conspiracy (R. 17a-18a). If respondents' argument is to be followed, the astounding legal anomaly would result that although joint tort feasors are both jointly and severally liable, should one tort feasor become the receiver of the fruits of the fraud, as well as having been a principal to the fraud, he is, by virtue of having thus become an accessory as well as principal, permitted to become the beneficiary of a judgment rendered in favor of his partner in fraud.

Respondents also question (brief p. 8) whether, in view of the fact that this action sounds in equity, a tort is here alleged. It is, we suggest, novel law if an action in equity may not be predicated upon a tort.

III.

Respondents Do Not Come Within the Exception to the Mutuality Rule.

Respondents quote (brief p. 8) the *Restatement of Judgments,* sec. 99, as justifying the application of the exception to the mutuality rule to this case. The rule of the Restatement is but a codification of the law laid down in *Bigelow v. Old Dominion Copper and Mining Company,* 1912, 225 U. S. 111, 32 S. Ct. 641, 56 L. Ed. 1009. Clearly respondents do not fall within the scope of the exception as there enunciated. Even if it be conceded that the rule of the Restatement enlarges the scope of the rule of the *Bigelow* case, the respondents do not fall within the exception as enlarged. The Restatement rule allows the application of the exception only if the second action is "based *solely* upon the existence of a tort or breach of contract" by the defendant in the first action. (Emphasis supplied). Here, petitioner is not suing respondents on a cause of action based *solely* upon the commission of a tort by Feuerring and Schwabacher but upon a tort committed *jointly* and simultaneously by Feuerring and Schwabacher and the present respondents. The rule of the Restatement might be applicable only if the respondents were bona fide purchasers.

Conclusion.

We respectfully submit that the Circuit Court of Appeals was in error in its conception of the applicable law of both New York and Pennsylvania in every respect important to the proper determination of this case. Under the New York law the nature of the proceeding to compel arbitration entirely foreclosed the application of the rules of privity to this case,—yet the opinion below is firmly bottomed thereon. If it be conceded that privity is applicable, the relevant New York decisions preclude its application here because the proceedings to compel arbitration and the arbitration proceedings are separable, and the purported succession in interest occurred too early for purposes of privity.

Moreover, even if the respondents here are privy to the New York respondents they would, under the Pennsylvania law, as joint tort feasors, be denied the benefit of the arbitration award in favor of their co-conspirators under the rule of *Bigelow v. Old Dominion Copper and Mining Company, supra.*

Respectfully submitted,

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